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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DESIREE SAMPLE,

Defendant and Appellant.

C046509

(Super. Ct. No.
00F07843)

Pursuant to a negotiated plea agreement, defendant Desiree Sample pleaded no contest to stalking (Pen. Code, § 646.9, subd. (a); further undesignated statutory references are to the Penal Code) and tampering with computer data (§ 502, subd. (c)(1)) and was placed on four years' probation with various conditions, including making restitution to the victim "in an amount to be

determined." Thereafter, the court ordered her to pay \$2,848 in restitution.

On appeal, defendant contends the restitution order violates her due process rights because she was not provided an opportunity to dispute the amount of restitution sought. We agree and remand for a restitution hearing.

FACTS AND PROCEDURAL HISTORY

Following defendant's no contest plea on October 21, 2001, the court referred the case to the probation department to prepare a presentence report and recommendation. According to that report, the victim claimed financial losses totaling \$7,398. The probation department, however, recommended defendant be ordered to pay restitution in the amount of \$2,848 for costs associated with moving (\$300), obtaining a restraining order (\$198), medication (\$50) and counseling (\$2,300).

At the sentencing hearing on March 27, 2003, defendant requested a restitution hearing to "dispute" the expenses claimed by the victim in the probation report.¹ The court acknowledged that defendant "is entitled to a hearing in that respect," and set a restitution hearing for April 17, 2003, at 8:45 a.m. in Department 4. The "Minute Order & Order of

¹ At the hearing the prosecutor advised the court that the victim had incurred additional counseling expenses in the amount of \$1,828, which were not reflected in the presentence report, and that the People would be seeking restitution for those costs as well.

Probation," filed March 28, 2003, directs defendant to "make restitution to the victim in an amount to be determined."

The restitution hearing scheduled for April 17, 2003, was dropped from the court's calendar with a note that it would be reset at a later date.

The restitution hearing evidently was not reset, and on January 21, 2004, the probation department submitted a letter to Judge Timothy Frawley in Department 63, advising him that "due to a clerical error" the probation department's recommendation that defendant be ordered to pay restitution in the amount of \$2,848 "was inadvertently left off the probation checklist" ² Accordingly, the probation department "respectfully recommended the defendant pay restitution in the amount of \$2,848."

Two days later, Judge Frawley issued an ex parte order directing defendant to make restitution to the victim in the amount of \$2,848.

DISCUSSION

Section 1202.4, subdivision (f) authorizes restitution directly to a victim for economic losses incurred as a result of the crime. However, "[t]he defendant has the right to a

² While this may have been true, this was not the reason the court's probation order provided that the amount of restitution was "to be determined." Having granted defendant's request for a restitution hearing, any determination as to the amount of restitution to be paid, if any, necessarily had to be deferred until after that hearing.

hearing before a judge to dispute the determination of the amount of restitution.” (§ 1202.4, subd. (f)(1).) “[A] defendant’s due process rights are protected if he is given notice of the amount of restitution sought and an opportunity to contest that amount. . . .” [Citations.]” (*People v. Brach* (2002) 95 Cal.App.4th 571, 579.)

Here, defendant was notified of the amount of restitution sought and requested a restitution hearing to contest that amount. A hearing was scheduled but was later dropped from the court’s calendar with a note that it was to be reset at a later date. Defendant’s assertion that the hearing was never rescheduled is consistent with the court’s minutes.

While the People acknowledge defendant’s request for a restitution hearing was granted and a hearing was scheduled for April 17, 2003, they contend “the existing record lacks any indication that [defendant] was subsequently denied that hearing.” This contention lacks merit.

There is no indication in the record that such a hearing ever took place and the People do not contend otherwise. Moreover, in response to the People’s contention, defendant successfully moved to augment the record on appeal to include a declaration from the courtroom clerk, confirming the April 17, 2003, hearing did not take place.

We conclude that the record on appeal sufficiently establishes that defendant was denied an opportunity to contest the amount of restitution.

DISPOSITION

The trial court's order requiring defendant to pay \$2,848 in restitution is vacated. The matter is remanded to the trial court with directions to conduct a restitution hearing.

BLEASE, Acting P. J.

We concur:

MORRISON, J.

HULL, J.